NECESSITY OF CERTAINTY OF SUBJECT-MATTER AND OBJECTS OF A TRUST IN PART CHARITABLE.—The question whether a testamentary trust is void for lack of certainly defined *cestuis que trustent* frequently involves the construction of powers. Although the donee of a naked power is of course at liberty to exercise it or not, the very opposite is true where the power is blended with a trust.[1] The courts upon ascertaining the testator's purpose to grant a compulsory power will imply a trust,[2] and since trusts are always imperative, will compel the trustee to act,[3] or if necessary will assume the duty provided the testator's intention is sufficiently defined.[4] Obviously that intention is impossible to ascertain if the selection of the particular beneficiaries was left to the trustee. Thus the question whether the uncertainty really relates to the identity of the beneficiaries or merely to the extent of their respective interests becomes of prime importance, for in the latter case the fact that it is at least clear that the testator intended each beneficiary to take something, moves the court to administer the trust,[5] whereas in the former it must fail unless the trustees act.[6] In reaching the testator's intention it would seem that where the several objects among which the beneficial interest is to be distributed in the trustees' discretion are mentioned in the will disjunctively, the trustees were intended to select which of the persons named should become beneficiaries, while the conjunctive is held to indicate that the testator intended all to take.[7] In the latter case the court can undertake the administration, and, unable to exercise the trustees' discretion in regard to apportionment, will divide the *res* equally, under the maxim that equality is equity.[8]

In the case of *Wilce* v. *Van Anden* (Ill. 1911) 94 N. E. 42, the court seems to have overlooked these considerations. A testator had directed his trustees to fund his property and use the income and if necessary the principal in the payment of certain life annuities. Thereafter they were to give such "part or portion " of the remainder as they might think proper to any one or more of the testator's brothers or sisters in need thereof,[9] and to devote the residue to certain

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[1] 2 Sugden, Powers (7th ed.) 158.

[2] 1 Perry, Trusts § 249; Gibbs *v.* Marsh (Mass. 1841) 2 Met. 243; Greenough *v.* Wells (Mass. 1852) 10 Cush. 571.

[3] 2 Sugden, Powers (7th ed.) 158; Lucas *v.* Lockhart (Miss. 1848) 10 Sm. & M. 466.

[4] Maberly *v.* Turton (1808) 14 Ves. 499; Izod *v.* Izod (1863) 32 Beav. 242; Wainwright *v.* Wainwright (1791) 1 Ves. Jr. 310. If after the death of the donee without having exercised the power, the *res* devolves upon the heir, he will take subject to the same trusts. Carfoot *v.* Carfoot (1664) 1 Ch. Cas. 35.

[5] Lucas *v.* Lockhart *supra;* Izod *v.* Izod *supra.*

[6] Down *v.* Worral (1833) 1 M. & K. 561; *In re* Eddowes (1861) 1 Dr. & Sm. 395; Robertson *v.* Allen (Va. 1854) 11 Grat. 785.

[7] Adnam *v.* Cole (1843) 6 Beav. 353.

[8] Doyley *v.* The Attorney General (1714) 4 Vin. Abr. 485; Lippincott *v.* Ridgway (N. J. 1854) 2 Stockt. 164.

[9] Where the *cestuis que trustent* are uncertain, the courts in many jurisdictions will follow any clue to the testator's intention, as that the property should go to such members of a class as might need it most, and administer the trust accordingly. Bull *v.* Bull (1830) 8 Conn. 47; 1 Perry, Trusts § 255.

charities. The court held the bequest void, first for uncertainty of objects, since in their opinion the trustees were free to exclude either the brothers and sisters or the charitable objects from the benefits of the trust, and second because of uncertainty of subject-matter, arguing that as the *corpus* of the fund might go to paying the annuities and no residue remain the trust must fail. It will be observed that the brothers and sisters were to receive a "part or portion" of that residue, and that the charitable objects were mentioned conjunctively with them. Keeping in mind the observations above made with reference to powers, it seems plain that the trustees' duty was to apportion the *res* between the brothers and sisters on the one hand and the charitable objects on the other, and therefore that there is no uncertainty as to identity of beneficiaries. In any case, however, so long as the trustees were willing to exercise the power, the existence of an option to exclude the one class of *cestuis que trustent* or the other would have been no reason for declaring the trust void. The only difficulty in that case would relate not to its validity but to its susceptibility of execution by a court, and would be no objection to permitting the trustees to act.[10] The court, however, seems to have been influenced by the cases holding that a trust for benevolent purposes which cannot be so construed as to confine its objects to charities in the legal sense is void. But only cases where the objects, so far as they are not charitable, are quite undefined, fall within this class.[11] In view of these considerations it seems impossible to sustain the court's position in respect to indefiniteness of beneficiaries.

As the court further decided, uncertainty of subject-matter, equally with uncertainty of objects, may doubtless be fatal to an attempted trust.[12] But here too it would seem that uncertainty, to have this effect, must relate to identity. Speaking accurately, therefore, the *res* is not uncertain because of a possibility that it may be exhausted, and that possibility seems to be no ground for declaring a trust void, as is indicated by the analogy of a remainder to a person named after a devise for life with unrestricted power of disposal,[13] and by the fact that in equity mere possibilities are assignable [14] even in

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[10]Miller *v.* Atkinson (1869) 63 N. C. 537; Bartlett *v.* King (1815) 12 Mass. 537; King *v.* Parker (Mass. 1851) 9 Cush. 71. In the last case Shaw, C. J., said: "It is no objection that at the time there was no court of equity in Massachusetts to enforce a trust specifically. It is a question not of remedy but of construction; what did the testator intend?"

[11]Morice *v.* The Bishop (1805) 10 Ves. 195; Chamberlain *v.* Stearns (1873) 111 Mass. 267. It is said that indefiniteness as to the beneficiaries of the charity is one of the distinguishining characteristics of these uses. See Saltonstall *v.* Sanders (Mass. 1865) 11 Allen 446; Bullard *v.* Chandler (1889) 149 Mass. 540.

[12]To prove the rule applicable to the case under discussion the court cited Mills *v.* Newberry (1885) 112 Ill. 123. That was a case of an absolute devise made on the condition that any residue of the property should be left by the devisee to a person named, and is obviously not in point as regards the principal case. Such a condition is properly void as repugnant to a devise of the fee.

[13]Surman *v.* Surman (1820) 5 Mad. 123; Walker *v.* Pritchard (1887) 121 Ill. 221; 2 Woerner, Administration (2nd ed.) 949.

[14]Fitzgerald *v.* Vestal (Tenn. 1856) 4 Sneed 258; Beckley *v.* Newland (1723) 2 P. Wms. 182; Wethered *v.* Wethered (1828) 2 Sim. 183.

trust.[15] But in the case under consideration the continued existence of the *res* depended merely on its not being consumed in furthering the use to which it was limited for certain lives, so that the analogy to a remainder after a life estate in perishable property is very close. It is settled that such remainders are good although because of the disappearance of the subject-matter their enjoyment may never be realized,[16] and it is therefore conceived that no reason can be found why they should not support a trust equally with a mere possibility. In view of their analogy to the case under consideration it seems to follow that the court should have sustained the trusts in question. Indeed the chief difficulty on both branches of the case appears to have arisen from the use of a word so broad of application as "uncertainty," and it seems that had the more accurate term "indefiniteness" been employed the court might have reached a more satisfactory conclusion.

PREFERENCES TO CORPORATE DIRECTORS.—In recognizing that the relation of a director toward his corporation is of a fiduciary nature, the courts have established a doctrine not always easy of application. Thus, while it is readily perceived that according to this theory the director must be amenable for such breaches of trust as a fraudulent misapplication of corporate assets,[1] the exact consequences of the director's status are somewhat difficult of determination as affecting his right to receive a preference from his corporation. In view of the rule now well established that a solvent corporation, holding its property free of any trust in favor of creditors, may deal with it, subject to statutory or charter restrictions, with the same liberty as an individual,[2] it is clear that prior to insolvency, artificial as well as natural persons must have the power to create preferences as they may see fit, even though a director be the favored creditor. Similarly this should be true where the corporation, though in financial difficulty, is still a "going concern" with a reasonable expectation of ultimate success. Furthermore, even when the liabilities of a corporation exceed its assets, and it has ceased to do business, or has taken or is about to take a step which is likely to incapacitate it for conducting the corporate enterprise,[3] although in some few States the mere fact of its insolvency still operates to convert its assets into a trust fund for the benefit of creditors,[4] yet by the great weight of authority the application of this doctrine is now restricted to property in process

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[15]Hobson *v.* Trevor (1723) 2 P. Wms. 191.

[16]Walker *v.* Pritchard *supra;* Evans *v.* Inglehart (Md. 1834) 6 Gill & J. 171; Major *v.* Herndon (1879) 78 Ky. 123.

[1]His responsibility of course is primarily toward the corporation rather than toward the stockholders, with whom he has no legal privity. Smith *v.* Hurd (Mass. 1847) 12 Met. 371.

[2]Morawetz, Private Corporations (2nd ed.) § 802; 5 Thompson, Corporations §§ 6482, 6496; and see Ames *v.* Heslet (1897) 19 Mont. 188; Worthen *v.* Griffith (1894) 59 Ark. 562.

[3]Corey *v.* Wadsworth (1891) 99 Ala. 68.

[4]In such jurisdictions, of course, even preferences to general creditors are disallowed. Rouse *v.* Merchant's Bank (1889) 46 Oh. St. 493; Conover *v.* Hull (1895) 10 Wash. 673; Lyons-Thomas Co. *v.* Perry Stove Co. (1893) 86 Tex. 143.